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SUPREME COURT OF THE UNITED STATES

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1910,

Petitioners,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

1. Opinions Below

The opinion of the District Court below on the merits (R. 301-329)[1] is printed at 201 F. Supp. 241. The opinion

1. We so identify citations to the Joint Appellants' Appendix below.

of the Court of Appeals affirming that decision is reported at 319 F. 2d 117.

2. Jurisdiction

The Court of Appeals denied motions for rehearing on August 5, 1963, and petitions for certiorari were filed on November 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

3. Questions Presented

In a civil action founded upon diverse citizenship, respondent North Western[2] sought and obtained a declaratory decree that three provisions in its contract with petitioner P&PU[3] purporting to bar North Western from serving industries at or near Peoria, Illinois, were ineffectual. The Court of Appeals for the Seventh Circuit affirmed that judgment, holding that the three provisions in question constituted pooling of railroad services and traffic which, for lack of prior approval by the Interstate Commerce Commission, were unenforceable, and that the three clauses in question also violated Section 1 of the Sherman Act.

As stated by the Court of Appeals:[4]

> The basic issue on this appeal is whether the District Court properly concluded that the course of business conduct required by the three clauses hereinbefore described, constituted pooling of railroad service and traffic; also whether such conduct would be a violation of Section 1 of the Sherman Act, (15 U.S.C. Sec. 1).

2. Chicago and North Western Railway Company.
3. Peoria and Pekin Union Railway Company.
4. Slip opinion at page 5, 319 F.2d 117 at 121.

4. Restatement of the Case

Stated succinctly in the Court of Appeals opinion,[5] this dispute arose when, in 1957 respondent North Western built a short track at Sommer, Illinois, near Peoria, to connect with TP&W[6] (the "Sommer interchange") and to serve certain industries near Sommer with its own trains and switch engines. A proceeding was brought before the Interstate Commerce Commission and the Commission approved this operation (the "*Sommer* case").[7] P&PU objected that the North Western operations proposed at Sommer would violate its contract requiring North Western: (1) to give P&PU all cars requiring transfer to other railroads in the Peoria area; (2) to serve no industries in the area reserved by P&PU for exclusive service; and (3) to keep up rates to the P&PU level in the reserved area.[8] P&PU interjected this claim in the I.C.C. *Sommer* case[9] and then in this District Court suit for declaratory judgment counterclaimed for an injunction and damages against North Western for serving the forbidden area and interchanging freight cars directly to T.P.&W. without using P&PU.[10] P&PU alleged that such conduct violated its contract "for pooling their switching operations. . . ."[11] The I.C.C. in the *Sommer* case left resolution of the contract question for the District Court below[12] and specifically approved the pro-

5. Slip opinion at pages 3-7; 319 F.2d 117 at 119-123.

6. Toledo, Peoria & Western Railroad Company.

7. R. 96-120, (I.C.C. Finance Docket 19922 *Toledo, Peoria & Western RR Co., et al. Trackage Rights, Acquisition, Etc.*, 307 I.C.C. 801, 814).

8. Paragraphs Fourth, AA and FF of the P&PU contract, set out at pages 4-5 of the slip opinion; 319 F.2d 117 at 120.

9. R. 96 at 116.

10. R. 35 at 36, 39-40, *id.* 153, 157, 161-174 (note paragragh 8(g) at page 172).

11. R. 35 at 36, Paragraph (9) lines 16-19.

12. R. 96 at 116.

posed new operation finding[13] as the Court of Appeals below noted,[14] that as to all freight traffic there in question P&PU's service is "inadequate, wasteful, and unnecessary transportation and results in undue delays."[15] Yet it is this same traffic which P&PU seeks to obtain, by the injunction and damages which were sought below.

As to this Sommer business, North Western and P&PU are active competitors. Two courts below have specifically found just this.[16] The contract, if effectual, would bar North Western from serving the area in question, or from interchanging traffic directly with TP&W rather than using petitioner P&PU, as both courts likewise found.[17] Under the "two court rule" it is now too late to challenge these concurrent findings. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *Baker* v. *Schofield*, 243 U.S. 114, 118; cf. *Federal Trade Commission* v. *Standard Oil Co.*, 335 U.S. 396, 400. And, finally, if, as the two courts below concluded, the conduct required by the challenged provisions constitutes pooling,[18] even petitioner admitted[19] (and both courts found as a fact[20]) that I.C.C. has never granted its approval under Section 5(1), without which pooling is unlawful *per se*.

5. Argument—Reasons for Denying the Writ.

A. THE COURTS BELOW PROPERLY FOUND THAT THESE PROVISIONS VIOLATE SECTION 5(1) OF THE INTERSTATE COMMERCE ACT.

First, were the lower courts correct in concluding that

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13. *Id.* 96 at 117-118.
14. Slip opinion at 7, 319 F.2d 117 at 121-122.
15. Slip opinion at 7, 319 F.2d 117 at 122; R. at 113 and 117.
16. Slip opinion at 6-7, 319 F.2d at 122; 201 F. Supp. at 250-251, 253.
17. Slip opinion at 6-7, 319 F.2d at 122; 201 F. Supp. at 253.
18. Slip opinion at 8, 319 F.2d at 122; 201 F. Supp. at 253-254.
19. R. at 157 (Amended Answer of P&PU, paragraph 5a); R. at 122 (Admission 13 by P&PU).
20. Slip opinion at 7-8, 319 F.2d at 122; 201 F. Supp. at 254.

the conduct required by these clauses of the P&PU contract constitutes pooling? If they were, then petitioners' elaborate "supercession" argument,[21] applicable only to the antitrust aspect of the case, is moot.

"Pooling," the Congressional committee which enacted the original Interstate Commerce Act tells us,[22] consists of:

> simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.

Petitioners do not challenge the findings made twice below[23] that these provisions

> if valid, would prohibit [North Western] from serving industries accessible to its lines and from establishing interchange connections with any other railroad for its own account. Thus, the contract in that respect constitutes an agreement not to compete in P&PU's area of operations in terminal delivery or interchange traffic and not to compete with P&PU in the matter of soliciting for its own account or fixing rates for traffic moving in the Peoria-Pekin area served by P&PU's lines.

Thus the conduct required by these challenged provisions clearly constituted pooling of competing railroad services. Every circuit which has ever ruled upon this question has

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21. Petition of P&PU at pages 11-18.

22. S. Rep. No. 46, 49th Cong., 1st Sess. Appendix p. 153 (1886); see also *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366, 373-374 (2d Cir. 1963), certiorari denied — U.S. — (32 U.S. Law Week 3138), where the quoted language is set out in full, the court explaining (*id.* at 374) that pooling is "an attempt to apportion business among competing railroads on a basis other than individual performance."

23. Slip opinion at 6, 319 F.2d at 121; 201 F. Supp. at 254.

so held. See *Norfolk Southern Bus Corp.* v. *Virginia Dare Transp. Co.*, 159 F. 2d 306 (4 Cir. 1947), *certiorari denied* 331 U.S. 827; *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366, 373-374 (2 Cir. 1963), *certiorari denied* — U.S. —, 32 U.S. Law week 3138; and the many cases collected in the district court opinion.[24] I.C.C. decisions likewise compel this conclusion, as the district court also noted, giving considerable weight to the administrative interpretation of the statute.[25]

Petitioner's assertion (Petition of P&PU at p. 18) that "the decision below . . . usurped the [Interstate Commerce] Commission's 'exclusive and plenary' authority . . ." is a glaring misstatement. On the contrary, while I.C.C. could well have approved pooling under Section 5(1) in the 1946 proceeding, no such approval was sought by P&PU or even considered by the Commission (R. 157, 122). Significantly, however, when the question of enforcing these provisions arose in the *Sommer* case, I.C.C. deferred to the district court below for resolution of this issue (R. 116), consistent with its uniform practice of declining to construe or determine the enforceability of contracts.[26]

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24. 201 F. Supp. 241 at 252.

25. 201 F. Supp. 241 at 253.

26. An unbroken series of Entire Commission decisions makes it plain that I.C.C. has no competence to construe, enforce, or hold unenforceable any contracts. In *McArthur Bros.* v. *El Paso & S. W. Co.*, 24 I.C.C. 30, 31 (1915) the Entire Commission held that: "Since only the courts are empowered to enforce [the contract], an expression of opinion by the Commission would be entirely gratuitous, and binding on no one." Again, in *Express Contract, 1920*, 59 I.C.C. 518, 523 (1920) the Entire Commission noted in a pooling contract, "If the contract is entered into and controversies arise between the parties thereto the courts constitute the forum, in which they could and should be adjudicated, and we, therefore, decline to express any opinion with regard to the particular provisions of Article V or any other part of the contract." See also *Gulf, M. & O. RR.—Abandonment*, 282 I.C.C. 311, 331-335 (Div. 4 1952) and *Express Earnings, Plan and Method of Division*, 278 I.C.C. 505, 513 (Entire Commission 1950).

Finally, however, reference of this matter to I.C.C. for approval of pooling for the future would be a useless act, since Section 5(1) requires that a pooling application be "assented to by all the parties involved," and North Western would certainly not assent to these provisions. Therefore, even prospective approval of pooling is impossible. *Escanaba & L. S. R. Co.* v. *United States*, 303 U.S. 315.

The case at this posture is most comparable to a proposed extension of interstate railroad line. Unless I.C.C. first determines whether public convenience requires the extension, the district courts are empowered to enjoin construction until affirmative Commission approval is obtained. The court determines whether the construction constitutes an "extension," just as these courts held that the conduct required by these three clauses was "pooling." *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 273.

Since the contract had never been presented to I.C.C. for approval under Section 5(1), this pooling was clearly unlawful under the statute, a result ordained by every prior judicial or agency decision and the legislative history of the Act. The lower courts were clearly correct in thus disposing of this question, and no question of significance warrants further review. Thus, on the pooling aspect of the case alone, these many decisions would warrant even summary affirmance of the lower courts here.

B. THE COURTS BELOW PROPERLY FOUND THAT THESE PROVISIONS VIOLATE SECTION 1 OF THE SHERMAN ACT ALSO.

Petitioners rely in the main upon the argument (Petition of P&PU at 11-18) that the Sherman Act (15 U.S.C. 1) has been superseded as to all activities of regulated railroads by some undisclosed provision of the Interstate Commerce Act (49 U.S.C. 1-26), seeking solace in *Pan American World Airways* v. *United States*, 371 U.S. 296. The short answer to this contention is that the Interstate

Commerce Act contains no provision comparable to Section 411 of the Civil Aeronautics Act (49 U.S.C. 1381).[27] Moreover, the *Pan American* decision permits no such inference, since the Court there made it plain (371 U.S. 296 at 304, footnote 9) that it has never held that the 1887 Interstate Commerce Act impliedly repealed the later (1890) Sherman Act as to railroads' activities, citing *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439. The many other decisions squarely in point include *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 311-315, and *United States* v. *Joint Traffic Ass'n.*, 171 U.S. 505, 573-578, decisions followed uniformly up through *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, and properly applied here, we submit.

Contending that these provisions are simply "exclusive dealing" provisions (Petition of P&PU at 37), petitioners would sweep the findings below under the rug of *White Motor Co.* v. *United States*, 372 U.S. 253, asserting that the lower courts found that "a Trunk Line Railroad Is Always 'Competitive' With a Terminal Railroad (Petition of P&PU at p. 28)."

This beguiling overgeneralization was laid to rest by specific findings of the district court[28] and of the court

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27. Petitioners concede this at page 13 of P&PU's petition.

28. The district court explained (R. 316-318, 201 F. Supp. 241 at 250-251) that:

> At the outset, I had the impression that the question of the competitive positions of plaintiff and P.&P.U. presented a genuine issue of material fact. That impression followed P.&P.U.'s contention that it is a terminal road serving the Peoria gateway and that it does no line-haul business, while C.&N.W. is a line-haul road serving areas northward and southward from Peoria. Thus, P.&P.U. insists that plaintiff and P.&P.U. are end to end roads, complementary to each other and in no real sense competitive.
>
> The first impression was dispelled, however, by an analysis of the pleading in the light of realization that the first impression

of appeals[29] that North Western and P&PU are competitive at Sommer and Peoria, Illinois in the specific circumstances shown by this record.

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stemmed from a generalization of the respective functions of P.&P.U. and C.&N.W. Upon what we may characterize as plaintiff's bread and butter business, the line-haul movement of freight, P.&P.U., as a terminal road operating in the Peoria gateway, is not a competitor of C.&N.W. But the generalization does not apply to terminal service at the gateway because plaintiff's line does not terminate at Peoria. Peoria, on the contrary, is an intermediate point upon a through line from Chicago to St. Louis. The pleadings admit of no doubt that C.&N.W. and P.&P.U. have been potentially competitive in a limited area at all times material to this controversy. Wherever, in the Peoria vicinity, the line of C.&N.W. intersects the lines of other trunk line railroads the direct interchange of traffic between plaintiff and such roads constituted an available alternative to plaintiff's use of P.&P.U.'s services. In fact, prior to March 6, 1957, plaintiff elected to deliver all traffic for local delivery and interchange to P.&P.U. and the potential competition between the two roads remained dormant. With the construction of 519.8 feet connecting track by T.P.&W., plaintiff's dormant competitive position at Hollis and Sommer was converted on that date to actual competition with P.&P.U., with respect to traffic which plaintiff could interchange directly with T.P.&W.

P.&P.U. by its answer, admits that plaintiff does now actively compete with it in that respect. In its counterclaim, P.&P.U. alleges that self-same competition by plaintiff is a violation of plaintiff's undertakings under the provisions of the 1911 contract.

With relationship to competition between P.&P.U. and M. &St. L., P.&P.U. admits by its answer that M.&St. L. for a number of years has conducted direct interchange in Peoria with T.P.&W., Rock Island and other roads in competition with services offered by P.&P.U. It further admits that plaintiff, operating M.&St. L. as a division of C.&N.W., has continued that same competition, and, by its counterclaim, P.&P.U. alleges that plaintiff's continuation thereof is a violation of

Under well settled decisions of this Court, this request to review these two concurrent findings of fact abuses the office of certiorari jurisdiction. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271; 275; *Baker* v. *Schofield*, 243 U.S. 114, 118. Moreover, since North Western and P&PU were competitive as to this traffic, *White Motor*, dealing with vertical market allocation,[30] is inapplicable, and the lower courts properly relied upon *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, and *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1.

The lower courts properly found Sherman Act violations in the allocation of markets among competitors required by clauses Fourth and FF on the authority of *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; *United States* v. *Addyston Pipe & Steel Co.*, 175 U.S. 211 and *Northern Pacific, supra*.[31] Likewise, the raw horizontal price fixing

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plaintiff's agreement.

Unquestionably, upon the pleadings alone and undisputed geographic facts, plaintiff and P.&P.U. are, in fact, competitors in those limited areas where plaintiff has direct access to the lines of other trunk line railroads. In a larger area, which is immaterial to this cause, plaintiff and P.&P.U. are end to end roads and not competitors. For example, the two are complementary roads with respect to traffic destined for interchange to and from a majority of the trunk line railroads serving the Peoria area, with whose lines plaintiff has no connection, and with respect to industries served by P.&P.U. which are not also served directly by plaintiff, T.P.&W. or plaintiff's M.&St.L. division.

Upon admitted facts, I find that plaintiff and P.&P.U. do compete for the terminal service market in Peoria and the Peoria vicinity in the areas above indicated.

29. Slip opinion at 6-7, 319 F.2d 117 at 121.

30. 372 U.S. 253 at 261, 263.

31. Discussion and analysis of these decisions is found at 201 F. Supp. 241 at 254.

required by clause FF (requiring North Western to handle any Peoria area business *"upon a schedule of rates therefor to be prescribed by said P&PU"*)[32] was properly held a Section 1 violation on the authority of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 and *Northern Pacific*, *supra*, upon which the district court relied.[33] Finally, the tying of unneeded services found "wasteful and unnecessary" by I.C.C.[34] to P&PU's other necessary terminal services by clauses Fourth and A-A runs squarely against this Court's decision in *United States* v. *Terminal Railroad Ass'n. of St. Louis*, 224 U.S. 383, where a terminal railroad just like P&PU was specifically ordered here (224 U.S. 383 at 411) to amend its contracts with users:

> By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Both lower courts found *St. Louis Terminal* dispositive on this element,[35] and could have relied just as well upon *United States* v. *Loew's*, 371 U.S. 38.

Thus this Court, the Interstate Commerce Commission and every federal court which has ever considered provisions such as these has found them unequivocally unlawful, under the Interstate Commerce Act, the Sherman Act, or both. The sole question presented here, then—whether these three provisions in the P&PU contract constitute "pooling" within the meaning of Section 5(1) of the Interstate Commerce Act—has been correctly decided by the courts below. Since no argument advanced in either peti-

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32. Slip opinion at pages 4-5, 319 F.2d at 121.
33. 201 F. Supp. at 254.
34. See page 4 *supra* and R. 117; see also R. 113-115.
35. 201 F. Supp. 241 at 255; Slip opinion at 8-9, 319 F.2d at 123.

tion raises any issue not already well settled by decisions not only of this Court, but by every federal court or agency which has ruled on it, no question is presented of sufficient substance to merit review by this Court.

6. Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submited

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Dated: November, 1963